March 17, 1995, Shannon was sentenced to fifteen years to life on that count, with an additional four years for a gun use enhancement and sixteen months on a weapons possession charge to which he had earlier pled nolo contendere. (CT 489)

The murder conviction was seriously flawed. Under the statutory law of California as it has existed for more than a century, a killing which occurs during the heat of passion constitutes not a murder, but the lesser included offense of manslaughter. Cal. Pen. Code § 192. Thus, in a California murder prosecution, both state law and the federal due process clause require, and have always required, the prosecution to prove beyond a reasonable doubt that a homicide was not committed in the heat of passion.

In the direct state court appeal of his conviction, Shannon argued that the trial court erred when, in instructing on lesser included offenses, it told the jurors that the existence of heat of passion reduces only intentional homicides (i.e., those committed with "express malice") as opposed to criminally reckless but unintentional homicides (i.e., those committed with "implied malice") from second degree murder to voluntary manslaughter. The trial court thus permitted the jury to consider heat of passion as authorizing a lesser manslaughter conviction only if Shannon *intended* to kill, a proposition which could not be reconciled with governing statutory mandates.

As Shannon also contended, the instructional error was particularly egregious because (1) there was ample

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docket entries in the federal district court; and "ER" to the Excerpts of Record in the Ninth Circuit appeal.

evidence that the charged offense constituted an unintentional homicide committed in the heat of passion, and (2) the prosecutor, aided by the court's instructions, expressly and erroneously argued in closing that the jury could not convict Shannon of the lesser offense of voluntary manslaughter because there was no evidence of an intent to kill. *See* App. at 3 (Ninth Circuit's discussion of Shannon's substantive claim).

Shannon's convictions were affirmed in a published opinion issued by the California Court of Appeal on June 27, 1996. *People v. Shannon*, 46 Cal.App.4th 1365 (1996). In that opinion, the appellate court acknowledged that the voluntary manslaughter instruction given at Shannon's trial was illogical and probably erroneous. *Id.*, at 1370. The Court of Appeal nevertheless deemed itself bound by California Supreme Court precedent which seemingly approved the instruction. The Court of Appeal expressly urged the state's high court to accept Shannon's case on review to decide the important instructional issue implicated by that court's precedent. *Id.* The Supreme Court, however, denied review in an order issued on October 17, 1996. (ER 25)

Of great importance, absent a holding that the instruction had misstated the elements of voluntary manslaughter under state law, Shannon could not raise a federal claim that the instruction also deprived him of his right under the federal constitution to have his jury instructed on all elements of a charged offense. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-38 (1940) (federal courts are bound by state intermediate appellate court's construction of state law, particularly where, as in the present case, the state supreme court denies review of intermediate court's decision); *Solis v.*

Garcia, 219 F.3d 922, 927 (9th Cir. 2001) ("We accept, as we must, the California Supreme Court's identification of the elements of the offense."); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (prosecution bears burden of proving every element of state offense beyond a reasonable doubt); *Mullaney v. Wilber*, 421 U.S. 684, 704 (1975) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.").

On June 2, 2000 – nearly four years after denying review of Shannon's appeal – the California Supreme Court finally addressed the precise instructional issue raised by Shannon in his previous appeal. *See People v. Lasko*, 23 Cal.4th 101 (2000). In *Lasko*, the Court found that the very same voluntary manslaughter instruction previously challenged by Shannon – CALJIC 8.40 – was, indeed, a misstatement of California law as it had always existed, i.e., *including* the time of Shannon's trial and direct appeal, because the instruction improperly limited voluntary manslaughter to intentional homicides, thereby relieving the prosecution of its obligation to disprove heat of passion in the case of criminally reckless but unintentional killings. *Id.*

On August 28, 2000, relying on *Lasko*, Shannon returned to the state court of appeal on habeas corpus, arguing that his conviction was fatally flawed by the improper voluntary manslaughter instruction, which had unconstitutionally relieved the prosecution of its burden to prove beyond a reasonable doubt all elements of the murder charge. On November 9, 2000, the state Court of Appeal denied the petition without oral argument or opinion. (App. 37) Despite its holding in *Lasko*, which had

credited the substance of Shannon's earlier argument, the California Supreme Court again denied review in an order issued on January 30, 2001. (App. 38)

C. Federal Court Proceedings

On August 27, 2001 – i.e., within a year of the state Supreme Court's January 20, 2001 ruling – Shannon filed a petition for habeas corpus relief in the federal district court. (Dkt. 1) At the conclusion of briefing, the district court denied the petition, concluding that it was untimely filed for essentially the same reasons as those expressed in the panel's opinion (discussed further below). (App. 15-29)

Shannon timely appealed from the district court's decision (Dkt. 22) after which the district court denied him a certificate of appealability as to all issues. (Dkt. 24) The Ninth Circuit, however, subsequently certified for appeal the following issues: (1) whether the district court erred in dismissing appellant's 28 U.S.C. § 2254 petition as untimely; (2) whether appellant was entitled to equitable tolling; and (3) whether the trial court's instruction on voluntary manslaughter violated appellant's constitutional rights. *See* 28 U.S.C. §§ 2244(d)(1), 2253(c)(3).

After considering the briefing and the parties' oral argument, the panel issued the published opinion denying Shannon's petition solely on procedural grounds, i.e., on the first two of the certified grounds identified above. (App. 1-14) Shannon filed a timely petition for rehearing en banc, which petition was denied in a Ninth Circuit order issued on August 23, 2005. (App. 39)

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA SUPREME COURT'S *LASKO* DECISION SUPPLIED PETITIONER WITH THE FACTUAL PREDICATE FOR HIS CONSTITUTIONAL CLAIM WITHIN THE MEANING OF SECTION 2244(d)(1)(D), AND THE NINTH CIRCUIT'S CONCLUSION TO THE CONTRARY IS IRRECONCILABLE WITH THIS COURT'S RECENT DECISION IN *UNITED STATES V. JOHNSON*

A. The Scope of 28 U.S.C. § 2244(d)(1)(D)

28 U.S.C. § 2244(d)(1)(D) provides that, if later than the other dates on which AEDPA's one-year limitations period may be deemed to commence, that period commences on

> the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Shannon has consistently argued that the decision in *Lasko* supplied, for the first time, a key factual predicate under section 2244(d)(1)(D) for his constitutional due process claim arising from the state trial court's homicide instructions. That predicate took the form of a binding pronouncement as to the elements of voluntary manslaughter, in the absence of which petitioner's federal constitutional claim would not have been cognizable in any court. The state supreme court's belated recognition that heat of passion may reduce unintentional but criminally reckless killings to voluntary manslaughter was, in effect, no less a factual predicate to the constitutional claim than were the defective instructions themselves. Shannon was

therefore entitled to file his federal petition within a year of the date (January 30, 2001) the state Supreme Court denied the *Lasko* claim, excluding any tolling periods applicable after that date.[2] *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) (parallel provision triggering limitations period for motions under section 2255 on date that factual predicate arose or could have been discovered resets the limitations period's beginning date, moving it from the time when the conviction became final to the later date on which the particular claim accrued); *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir. 2002) (citing several cases for the "proposition that the AEDPA cannot be interpreted to require a prisoner to raise claims before they arise"); cf. *LaGrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999) (petitioner not barred from asserting in second petition a claim that was not ripe at the time of the first petition).

Stated otherwise, under the reasoning of *Wims* and related precedent, the "facts" giving rise to Shannon's claim in the present case necessarily included the state Supreme Court's *Lasko* decision since, before the time of

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[2] Shannon's pursuit of state habeas relief on the basis of *Lasko* tolled the AEDPA limitations period from the time that he filed his state petition based on *Lasko* (August 28, 2000) at least until January 30, 2001, when the state supreme court finally denied the *Lasko*-based claim. *See* App. 38 (state supreme court's order); 28 U.S.C. § 2244(d)(2) ("[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."); *see also Carey v. Saffold*, 536 U.S. 214 (2002) (Application for state collateral review is "pending" in the state courts so as to toll time period for seeking federal habeas remedy during time between a lower state court's decision and the filing of a notice of appeal to a higher state court).

that factual development, Shannon's federal constitutional claim had never *accrued* and could not be pursued in federal court.

B. This Court's Decision in *Johnson* Mandates a Finding That Shannon's Federal Habeas Petition Was Timely

Respondent challenged Shannon's construction of section 2244(d)(1)(D) on the grounds that a legal ruling cannot, by its terms, constitute the "factual predicate" for a habeas application under section 2254 or a motion to vacate under section 2255 since the phrase encompasses only historical facts which can never include legal events or developments. *See, e.g.*, Appellees' Ninth Circuit Brief, at 34-39. Before the panel's decision in the present case, however, this Court flatly rejected that argument when it decided *United States v. Johnson, supra,* __ U.S. __, 125 S.Ct. 1571 (April 4, 2005).

Johnson essentially held that notice of a state court's order vacating a conviction previously used to enhance a federal sentence is a new "fact" that triggers a renewed one-year limitations period in which to seek collateral review of the federal sentence under section 2255, par. (4). That provision parallels the "factual predicate" language that is contained in section 2244(d)(1)(D) and applies equally to habeas applications brought under section 2254.[3] Shannon

[3] As the Ninth Circuit correctly noted, the factual predicate provisions relating to sections 2254 and section 2255 are "almost identical" and "the Supreme Court has interpreted the statute-of-limitations provisions of § 2244 and § 2255 in concert with one another. *See, e.g., Lackawanna County,* 532 U.S. at 402, 121 S.Ct. 1567 (plurality op. of O'Connor, J.)." (App. at 9)

submits that *Johnson* establishes the state court's *Lasko* decision as the factual predicate for his federal due process claim, rendering his federal habeas petition timely.

The Ninth Circuit's decision expressly concedes that, under the reasoning of *Johnson*, a legal ruling can in certain instances constitute the factual predicate for a habeas application. (App. at 10) The Ninth Circuit ruled, however, that *Johnson* does not apply because the relevant ruling in *Johnson* was "a decision in the petitioner's own case," while, in the present matter, the *Lasko* decision was "unrelated to Shannon's case and had no direct effect on his legal status." *Id.*, at 1088-89 (App. at 10) The panel went on to observe that *Lasko's* "clarification" of the manslaughter elements is "not subject to 'proof or disproof like any other factual issue,'" *id.* (quoting *Johnson*, 125 S.Ct. at 1580), noting in this connection that a jury would never be asked to decide "whether a judicial decision had indeed changed a state's law in the relevant way . . . " *Id.* (App. at 10-11)

This analysis and corresponding result are erroneous for several reasons. First, as a preliminary matter, *Lasko* did not "change" the law of manslaughter and murder to conform to the view expressed by Shannon during his 1996 appeal. Instead, *Lasko* effectively stated that Shannon's view of the elements had *always* been correct, and that all intermediate appellate courts – necessarily including the state Court of Appeal that decided *Shannon* in 1996 – had erred in construing the elements in a contrary fashion. *See People v. Parras*, 128 Cal.App.4th 1603, 1608-09 (2005) (observing that *Lasko* overruled construction of manslaughter elements requiring intent to kill, as applied in appellate court's 1996 *Shannon* opinion; that *Lasko* set forth the elements of manslaughter as they had always

existed; and that *Lasko* statement of elements is accordingly retroactively applied, i.e., regardless of date that criminal incident occurred)

Second, it is beyond cavil that *Lasko* did, in fact, overrule *Shannon*, for it condemned the same instruction (CALJIC 8.40) challenged by Shannon in his 1996 appeal, and for the same reasons Shannon raised in that appeal. In this sense, contrary to the Ninth Circuit's opinion, *Lasko* was clearly "related" to *Shannon*, for it represented a complete negation of the position advanced by the state appellate court when it denied Shannon's appeal in 1996, and by the state supreme court *itself* when it denied review of that appellate court ruling.

Third, and again contrary to the Ninth Circuit's view, *Lasko*'s overruling of *Shannon* is an historical event that can be ascertained by a federal court as readily as many others that may be implicated by section 2244(d)(1)(D). Certainly federal courts can and do recognize the overruling and even modification of prior decisions and rules as matters of demonstrable fact. *See, e.g., Lockhart v. Fretwell*, 506 U.S. 364, 384 (1993) ("The fact that Collins was later overruled does not minimize in the slightest the force of that evidence."); *Gooding v. United States*, 416 U.S. 430, 453 (1974) ("This conclusion [concerning the operation of a federal statute and rule] is reinforced by the fact that Federal Rule 41 has been subsequently modified to more closely resemble the District of Columbia statute and rule.") And whether one state court has overruled or reversed another is just as discernible an event as whether a state court has legally and unambiguously vacated a prior conviction, the acknowledged factual predicate for the claim asserted in *Johnson*.

Fourth, on a closely related point, the likelihood that a *jury* would be asked to decide whether or not a one state decision has overruled another and has been retroactively applied is not a relevant consideration for purposes of determining the applicability of *Johnson*. Again, federal courts rather than juries decide all of the many historical questions that arise in determining timeliness under AEDPA, including whether and when a habeas petitioner discovered or should have discovered the factual predicate for his claim for purposes of applying the limitations period under section 2244(d)(1)(D). Because a federal court is capable of recognizing an overruling as a verifiable event, the factual predicate requirement of subsection (D) is satisfied.

Finally, the panel's opinion's predication (App. at 11-12) of dire consequences should the federal courts adopt Shannon's position concerning section 2244(d)(1)(D) is unfounded. Again, Shannon's federal constitutional claim was not actionable as such until the state supreme court effectively announced in *Lasko* that Shannon's construction of the elements as presented in his 1996 appeal had been correct all along. *See West v. American Telephone & Telegraph Co.*, *supra*, 311 U.S. at 237-38; *Solis v. Garcia*, *supra*, 219 F.3d at 927. Very few state prisoners can point to so compelling a development, i.e., one that supplies federal constitutional dimension to a previously preserved claim, in their efforts to categorize that development as a "factual predicate" for a federal habeas application. The writ should issue on this ground alone.

II. THE CALIFORNIA SUPREME COURT'S *LASKO* DECISION CONSTITUTED THE REMOVAL OF A STATE COURT IMPEDIMENT TO THE FILING OF PETITIONER'S FEDERAL HABEAS PETITION WITHIN THE MEANING OF SECTION 2244(d)(1)(B), AND THE PANEL'S CONTRARY CONCLUSION MISCONSTRUES THE STATUTORY LANGUAGE AND THE SUPREME COURT'S DECISION IN *LACKAWANNA COUNTY V. COSS*

A. The Scope of 28 U.S.C. § 2244(d)(1)(B)

28 U.S.C. § 2244(d)(1)(B) provides that, if later than the other date on which AEDPA's one-year limitations period may be deemed to commence, that period commences on

> the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.

Id.

The state appellate court was wrong in its ruling, based on state Supreme Court precedent, that under California law the absence of heat of passion was not an element that had to be proven by the state beyond a reasonable doubt, a conclusion which necessarily defeated petitioner's claim of instructional error. Nor was there any question but that the federal courts were bound by those interpretations of California state law until they were corrected by *Lasko*. *See West v. American Telephone & Telegraph Co.*, *supra*, 311 U.S. at 237-38; *Solis v. Garcia*,

supra, 219 F.3d at 927 ("We accept, as we must, the California Supreme Court's identification of the elements of the offense.").

The state appellate court's June 27, 1996, decision in *Shannon*, and the Supreme Court's refusal to review that decision on October 17, 1996, were state-created impediments to Shannon's seeking federal habeas relief from his conviction. That is a conclusion compelled by the plain meaning of the statutory language, and Shannon is entitled to avail himself of the relief it affords him. *See Rake v. Wade*, 508 U.S. 464, 471 (1993) ("Where the statutory language is clear, [the federal court's] 'sole function . . . is to enforce it according to its terms.'" [Citations omitted]).

In its opinion, the Ninth Circuit panel rejected this view, stating that:

> The limited case law applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to prepare and to file habeas petitions by denying access to legal materials. *See, e.g., Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000) (en banc); *Egerton v. Cockrell*, 334 F.3d 433 (5th Cir. 2003). *A plurality of the Supreme Court has also suggested that the provision would apply if a "state court . . . refuse[d] to rule on a constitutional claim that ha[d] been properly presented to it." Lackawanna County Dist. Att'y v. Coss*, 532 U.S. 394, 405, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) (plurality op. of O'Connor, J.). These cases comport with the plain meaning of the provision, which applies when a petitioner has been impeded from *filing* a habeas petition.

Id. (App. 7-8) (Emphasis added)

B. The Statutory Language and This Court's Decision in *Lackawanna* Mandate a Finding That Shannon's Federal Habeas Petition Was Timely

Whether or not the "limited law" applying the provision has addressed a specific factual matrix – prison officials who have allegedly interfered with the preparation and filing of a habeas petition – it is the statutory language itself that controls and that must, where appropriate, be applied. *Rake v. Wade*, *supra*, 508 U.S. at 471. Furthermore, and of equal importance, while the panel's analysis of section 2244(d)(1)(B) mentions *Lackawanna*, it fails to give effect to the cited language in that case. Specifically, *Lackawanna* contemplates the finding of an "impediment" under the statute *not* simply where the petitioner has been *prevented from filing* his federal application, but rather where the intransigence or error of the state courts has delayed the accrual or cognizability of the underlying federal claim. *Id.*, 532 U.S. at 405.

The California courts error and inaction in petitioner's case are very much like the state court's conduct that *Lackawanna* deemed an impediment for purposes of applying section 2244(d)(1)(B). In addition, if unjustified inaction by state courts on a federal constitutional claim can be deemed an impediment "in violation of" the Constitution or federal law, as *Lackawanna* indicates, so too can state court decisions that bar a defendant from raising a federal constitutional claim and that are later condemned as invalid by the highest court in that state. *Compare* 410

F.3d at 1088, n. 4 (App. 8).[4] Shannon's federal habeas petition was timely for this reason as well.

CONCLUSION

For the foregoing reasons, Shannon's federal habeas petition should have been deemed timely filed under both 28 U.S.C. §§ 2244(d)(1)(B) and 28 U.S.C. §§ 2244(d)(1)(D). The petition for a writ of certiorari should accordingly be granted.

Dated: November 21, 2005

Respectfully submitted,

DONALD M. HORGAN
Counsel of Record for
Petitioner Brian Shannon

[4] The panel's conclusion that acceptance of Shannon's position concerning the scope of section 2244(d)(1)(B) would spawn a flood of new habeas applications (410 F.3d at 1088; App. at 8) is unfounded for the same reasons stated in connection with Argument I, *supra*.

410 F.3d 1083

United States Court of Appeals,
Ninth Circuit.
Brian Dennis SHANNON, Petitioner-Appellant,
v.
Anthony NEWLAND, Warden, Respondent-Appellee.
No. 03-16833.

Argued and Submitted April 11, 2005.
Filed June 8, 2005.

Donald M. Horgan, Riordan & Horgan, San Francisco, CA, argued the cause and filed briefs for the petitioner; Dennis P. Riordan was on the briefs.

Juliet B. Haley, Attorney General's Office, San Francisco, CA, argued the cause and filed a brief for the respondent; Bill Lockyer, Robert R. Anderson, Gerald A. Engler, and Peggy S. Ruffra were on the brief.

Appeal from the United States District Court for the Northern District of California, Martin J. Jenkins, District Judge, Presiding. D.C. No. CV-01-03275-MJJ.

Before BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

O'SCANNLAIN, Circuit Judge.

We must decide whether a California prisoner's petition for writ of habeas corpus is timely when it is filed long after his conviction but shortly after a decision by the California Supreme Court clarifying the state's criminal law in a way potentially favorable to his federal constitutional claim.

I

In October 1993, Brian Shannon and his girlfriend, Kimberly Stack, began to argue heatedly in the living room of Shannon's home. Stack was killed by a shot from a handgun that Shannon kept on the premises. Evidence suggested that the couple had been struggling physically at the time of the shooting or shortly before. Shannon was charged with murder and convicted by a jury. The court sentenced him to fifteen years to life on that count, with an additional enhancement of four years for the use of a gun and sixteen months on a weapons possession charge to which Shannon pled *nolo contendere*.

Shannon appealed his conviction, arguing (among other things) that the trial court had incorrectly instructed the jury. At Shannon's trial, the jury was instructed on the elements of second-degree murder, which consists, in California, of "the unlawful killing of a human being with malice aforethought." It was instructed that "malice" exists either when "there is manifested an intention unlawfully to kill a human being," or when the defendant intentionally performs an act which he knows is dangerous to human life.[1] It was instructed that murder is reduced to manslaughter if the defendant acted "upon the ground of sudden quarrel or in the heat of passion" and that "[t]o establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that

[1] The prosecution alleged that Shannon acted with malice aforethought because he intended to kill Stack or, in the alternative, behaved with wanton disregard for human life by brandishing a gun he knew was dangerous. The defense argued that the shooting was an accident.

the act which caused the death was not done in the heat of passion or upon a sudden quarrel."

The parties do not dispute that all of the above instructions were accurate. Shannon's objection, rather, is to the court's instructions defining the lesser offense of voluntary manslaughter. The court instructed the jury that "[e]very person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter," and that voluntary manslaughter requires the prosecution to prove that "[t]he killing was done with the intent to kill." Shannon argued on appeal that the trial court erred in instructing the jury that *intent* to kill is required for a voluntary-manslaughter conviction. Instead, Shannon argued, voluntary manslaughter – like murder – can also be committed by acting with reckless disregard for human life.

The error was important, Shannon argued, for the following reasons. Murder requires either intent to kill or reckless disregard for life. If the killing is of the intent-to-kill variety, then the existence of "heat of passion" clearly reduces the charge to voluntary manslaughter. What happens, however, when the killing is of the reckless-disregard variety, but the defendant acted in the heat of passion? The crime should not be murder, because heat of passion negates malice; but it cannot be voluntary manslaughter under the trial court's instructions, because that crime requires actual *intent* to kill. Shannon thus argued that voluntary manslaughter must include reckless-disregard homicides as well as intentional ones and that the erroneous instruction could have led the jury to convict him of murder even had the prosecution failed to meet its burden to disprove heat of passion.

The California Court of Appeal rejected Shannon's claim in June 1996, opining that his "argument does make sense" but holding that it was bound by prior decisions of the California Supreme Court that included intent to kill as an element of voluntary manslaughter. *See People v. Shannon,* 46 Cal.App.4th 1365, 1370, 54 Cal.Rptr.2d 416 (1996). The California Supreme Court denied review on October 17, 1996.

Because Shannon did not petition the U.S. Supreme Court for certiorari, his conviction became final, for purposes of the statute of limitations for a habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), when the period for filing such a petition elapsed on January 17, 1997. *See Bowen v. Roe,* 188 F.3d 1157, 1159-60 (9th Cir.1999). He sought no federal habeas relief at that time, and the standard limitations period of one year from the date of final judgment, 28 U.S.C. § 2244(d)(1)(A), therefore expired on January 17, 1998.

In June 2000, the California Supreme Court decided *People v. Lasko,* 23 Cal.4th 101, 96 Cal.Rptr.2d 441, 999 P.2d 666 (2000), holding that the standard voluntary manslaughter instruction was indeed incorrect under California law because actual intent to kill is not an element of the crime. *Id.* 96 Cal.Rptr.2d at 443, 999 P.2d at 668. In August 2000, Shannon petitioned the California Court of Appeal for a writ of habeas corpus based on *Lasko.* The Court of Appeal denied his petition without opinion and the California Supreme Court denied review in January 2001.

On August 27, 2001, Shannon filed a habeas petition in district court for the Northern District of California,

arguing that the erroneous jury instruction violated his federal right to due process. The district court denied the petition as untimely and, in the alternative, on the merits. The district court denied Shannon's request for a Certificate of Appealability, but in December 2003, we granted a certificate and this appeal followed.[2]

II

A habeas petition by a person in custody pursuant to the judgment of a state court is subject to a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The date on which the one-year period begins is the latest of four possible dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

[2] We initially granted the certificate only as to the question of untimeliness, but subsequently expanded it to include the question whether the voluntary manslaughter instruction violated Shannon's constitutional rights.

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Since direct review of Shannon's conviction ended in 1996 and he did not file this habeas petition until August 2001, his petition clearly is not timely under subsection (A). He argues, however, that the California Supreme Court's decision in *Lasko* constituted either, under subsection (B), the removal of an "impediment to filing an application created by State action," or, under subsection (D), the factual predicate of his claim. Alternatively, Shannon argues, the period between his conviction and the California Supreme Court's decision in *Lasko* should be equitably tolled. We consider these arguments in turn.[3]

A

Shannon first argues that the California Supreme Court's decision in *Lasko,* by confirming his contention that his jury instructions had been erroneous, removed a state-created impediment to the filing of his habeas petition and thus triggered a new one-year statute of limitations under 28 U.S.C. § 2244(d)(1)(B). He contends that the state appellate court's rejection of his appeal in June 1996 and the California Supreme Court's refusal to review that decision in October 1996 were state-created impediments to his ability to seek habeas relief. Before the California Supreme Court decided *Lasko* in 2000, federal

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[3] We review *de novo* the dismissal of a habeas petition on grounds of untimeliness. *See Delhomme v. Ramirez,* 340 F.3d 817, 819 (9th Cir.2003). Legal determinations regarding equitable tolling are also reviewed *de novo. See Malcom v. Payne,* 281 F.3d 951, 956 (9th Cir.2002).

courts would have been bound by the state appellate court's holding that the challenged jury instruction accurately stated California law. *See West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237-38, 61 S.Ct. 179, 85 L.Ed. 139 (1940) (holding that federal courts must defer to an intermediate state court's interpretation of state law, made in the very case under consideration, when the state supreme court has denied review). Thus, Shannon argues, he was "imped[ed]" from filing his habeas claim until the California Supreme Court finally corrected the lower California courts' error and clarified the elements of voluntary manslaughter in *Lasko*.

We are not persuaded, however, that the state appellate court's decision was an "impediment" to Shannon's filing a habeas petition. He was free to *file* such a petition at any time. Shannon's real objection is that the state court's decision determined state law in a way that provided no legal basis for a federal habeas petition: since the state court held that the challenged instruction accurately defined voluntary manslaughter under California law, Shannon could not successfully argue in federal court that the instruction was so mistaken as to violate due process. But Shannon provides no support for the proposition that a state's determination of its own substantive law in a way that leaves a convict with no meritorious federal claim can constitute an "impediment" under § 2244(d)(1)(B), and so far as we can tell, none exists.

The limited case law applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to prepare and to file habeas petitions by denying access to legal materials. *See, e.g., Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir.2000) (en banc); *Egerton v. Cockrell*, 334 F.3d 433 (5th

Cir.2003). A plurality of the Supreme Court has also suggested that the provision would apply if a "state court . . . refuse[d] to rule on a constitutional claim that ha[d] been properly presented to it." *Lackawanna County Dist. Att'y v. Coss*, 532 U.S. 394, 405, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) (plurality op. of O'Connor, J.). These cases comport with the plain meaning of the provision, which applies when a petitioner has been impeded from *filing* a habeas petition.

It is not surprising that § 2244(d)(1)(B) has not been interpreted as Shannon suggests, because the implications of his contention would be serious. Whenever a state court clarified its own substantive or procedural law, any prisoner convicted under the understanding of the state's legal standard or procedure previously prevailing in state courts – no matter how long ago he was convicted – would be free to file a federal habeas petition. The text of § 2244(d)(1)(B) cannot bear that construction, and we decline to adopt it.[4]

B

Shannon also argues that the California Supreme Court's decision in *Lasko* triggered a new one-year statute of limitations under 28 U.S.C. § 2244(d)(1)(D) by supplying the "factual predicate" for his federal constitutional claim. This argument is equally difficult to square with the statute's language. Section 2244(d)(1)(D) refers to a "factual" predicate; the California Supreme Court's decision in

[4] Section 2244(d)(1)(B) also requires that the "impediment" be imposed "in violation of the Constitution or laws of the United States." Shannon does not explain how the pre-*Lasko* opinions of the California courts, interpreting the elements of voluntary manslaughter under California law, could violate the Constitution or federal laws.

Lasko, however, clarified the law, not the facts. If a change in (or clarification of) state law, by a state court, in a case in which Shannon was not a party, could qualify as a "factual predicate," then the term "factual" would be meaningless.

At our instruction, the parties discussed at oral argument the implications of the Supreme Court's recent decision in *Johnson v. United States,* ___U.S. ___, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005), for Shannon's claim of timeliness under § 2244(d)(1)(D). *Johnson* actually dealt with 28 U.S.C. § 2255, ¶ 6(4), the counterpart to § 2244(d)(1)(D) that applies to habeas-like motions by federal prisoners attacking their sentences. The two provisions are almost identical, though,[5] and the Supreme Court has interpreted the statute-of-limitations provisions of § 2244 and § 2255 in concert with one another. *See, e.g., Lackawanna County,* 532 U.S. at 402, 121 S.Ct. 1567 (plurality op. of O'Connor, J.).

In *Johnson,* a federal prisoner's sentence had been enhanced because of his prior state convictions. When one of the state convictions was subsequently vacated by a state court, Johnson sought to challenge his federal sentence under § 2255. Since more than a year had elapsed since his federal conviction became final, Johnson relied on § 2255, ¶ 6(4). The Eleventh Circuit held that a state legal decision did not qualify as a "fact" under that provision. *See Johnson v. United States,* 340 F.3d 1219, 1223 (11th Cir.2003). The Supreme Court, however,

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[5] Section 2255, ¶ 6(4), provides for the one-year limitations period to begin on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

rejected that analysis, holding that a state-court order vacating a petitioner's state conviction does qualify as a "fact" under § 2255, ¶ 6(4) – and thus, doubtless, would also qualify as a "factual predicate" under § 2244(d)(1)(D).

Johnson establishes that a state-court decision can, in some circumstances, qualify as a fact. There is, however, a crucial difference between *Johnson* and this case. In *Johnson*, the state-court decision in question was a decision in the petitioner's *own case*. It did not merely establish an abstract proposition of law; rather, it directly eliminated Johnson's legal status as a convict. That status was a fact used to enhance his sentence, just as the use of a gun or the quantity of narcotics sold are facts that can enhance a defendant's sentence. In this case, by contrast, the California Supreme Court's decision in *Lasko* was unrelated to Shannon's case and had no direct effect on his legal status.

The opinions in *Johnson* support this distinction. The majority noted that

> [w]e commonly speak of the "fact of a prior conviction," and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it. In either case, a claim of such a fact is subject to proof or disproof like any other factual issue.

Johnson, 125 S.Ct. at 1579-80 (citation omitted). By contrast, the California Supreme Court's clarification in *Lasko* of the elements of voluntary manslaughter under California law is *not* subject to "proof or disproof like any other factual issue." We would never, for example, ask a jury to decide whether a judicial decision had indeed

changed a state's law in the relevant way, nor would the parties introduce evidence on the question.

The dissenting Justices disagreed with the majority's resolution of the case, but for all purposes relevant to Shannon's case they agreed with the majority. Joined by each of the other three dissenters, Justice Kennedy wrote:

> The Court is quite correct, in my view, to hold that the state-court order of vacatur itself is the critical fact which begins [AEDPA's] 1-year limitations period. It is an accepted use of the law's vocabulary to say that the entry or the setting aside of a judgment is a fact. An order vacating a judgment is a definite and significant fact of litigation history. So the Court is on firm ground to say a state judgment of vacatur begins the 1-year limitations period.

Id. at 1583 (Kennedy, J., dissenting) (citations omitted). The California Supreme Court's decision in *Lasko* is not, by contrast, a "significant fact of [Shannon's] litigation history."

Thus, while the Court's decision in *Johnson* does establish that a state-court judgment can sometimes constitute a fact triggering a new limitations period under AEDPA, the language of both the majority and the dissent suggests that a state-court decision establishing an abstract proposition of law arguably helpful to the petitioner's claim does not constitute the "factual predicate" for that claim. Moreover, like Shannon's claim under § 2244(d)(1)(B), the construction of § 2244(d)(1)(D) that he urges would create a large loophole in AEDPA's scheme to promote finality. Whenever a state court announced a new interpretation or clarification of state law, that announcement would constitute the "factual predicate" for a federal

habeas claim seeking to enforce the new ruling retroactively. But nothing in AEDPA suggests that it was meant to take away state courts' ability to handle as they see fit the always-thorny problem of the retroactivity of changes in substantive law.

C

Finally, Shannon argues that the time between his conviction and the California Supreme Court's decision in *Lasko* should be equitably tolled.[6] Equitable tolling is available only when "extraordinary circumstances beyond a prisoner's control make it impossible to file the petition on time." *Stillman v. LaMarque,* 319 F.3d 1199, 1202 (9th Cir.2003). "Extraordinary circumstances exist when . . . wrongful conduct prevents a prisoner from filing." *Id.* (internal quotation marks omitted). Equitable tolling has been applied, for example, where the prison library was inadequate, *Whalem/Hunt v. Early,* 233 F.3d 1146, 1148 (9th Cir.2000) (en banc); where the prisoner was denied access to his files, *Lott v. Mueller,* 304 F.3d 918, 925 (9th Cir.2002); and where an attorney's egregious misconduct prevented timely filing, *Spitsyn v. Moore,* 345 F.3d 796, 801 (9th Cir.2003).

[6] In his opening brief, Shannon argues for tolling the period from the time of his conviction until the California Supreme Court denied the state habeas petition he filed based on *Lasko.* The reply brief, however, refers to the allegedly tolled period as lasting only until the California Supreme Court's decision in *Lasko* itself. The tolling of either period would suffice to render his claim timely. If Shannon's claim had merit, the second formulation would be the accurate one (because it is *Lasko* that he claims ended the "prevent[ion]" of his filing a federal habeas petition).

Each of the cases in which equitable tolling has been applied have involved *wrongful* conduct, either by state officials or, occasionally, by the petitioner's counsel. *See Stillman*, 319 F.3d at 1202 (9th Cir.2003) ("Extraordinary circumstances exist when . . . wrongful conduct prevents a prisoner from filing." (internal quotation marks omitted)). Moreover, in each case, the misconduct has actually prevented the prisoner from preparing or filing a timely petition. Shannon's case meets neither of those criteria. He does not argue that the California courts acted "wrongful[ly]" as a matter of federal law by defining voluntary manslaughter as requiring intent prior to *Lasko;* and nothing prevented him from preparing and filing a habeas petition at any time. His argument, rather, is that the state court prevented him from *prevailing* on a federal habeas claim, because, before *Lasko,* the federal courts would have had to accept the California courts' understanding of their own law.

Shannon's argument thus calls for an unprecedented extension of the principle of equitable tolling. We have stated, however, that "[e]quitable tolling is justified in few cases," and that "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Spitsyn,* 345 F.3d at 799 (alteration in original). Moreover, just like Shannon's previous arguments, this argument would open the door for any state prisoner to file a habeas petition anytime a state court issues a clarification of state law. Such an interpretation cannot be squared with the goals of finality that are central to AEDPA. Shannon is not entitled to equitable tolling.

III

Because Shannon's petition for writ of habeas corpus was untimely, the district court was correct to dismiss it. We need not reach – and take no position on – the merits of Shannon's constitutional claim. The judgment of the district court dismissing the petition as untimely is

AFFIRMED.

2002 WL 31357690 (N.D.Cal.)

United States District Court,
N.D. California.
Brian Dennis SHANNON, Petitioner,
v.
Anthony NEWLAND, Warden, Respondent.
No. C 01-3275 MJJ.

Oct. 10, 2002.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY

JENKINS, J.

INTRODUCTION

Petitioner Brian Dennis Shannon ("Shannon") is in the lawful custody of the California Department of Corrections, having been found guilty of second degree murder in a jury trial on December 12, 1994. Shannon now seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The petition requires this Court to determine whether the erroneous lesser included voluntary manslaughter instruction, stating that the crime required an intent to kill, relieved the prosecution of its burden of proof with respect to the element of malice in the greater included offense of second degree murder, and thus violated Shannon's constitutional right to due process under the Fourteenth Amendment. Having read and considered the papers, the Court DISMISSES the petition for a writ of *habeas corpus* as untimely.

FACTUAL BACKGROUND

On December 12, 1994, Shannon was sentenced in San Mateo Superior Court to fifteen (15) years to life for

the murder of his girlfriend Kimberly Stack ("Stack" or "victim"), with an additional four (4) years for use of a firearm, and sixteen (16) months for a weapons possession count to which he pled nolo contendere at the commencement of trial. (California Penal Code §§ 187, 12022.5(A), 12280(B)).

The events underlying the conviction occurred on October 17, 1993, at Shannon's residence in El Granada, California. At approximately 8:00 a.m., Shannon called "911" to report that his girlfriend had been shot.[1] A recording of the 911 call was played for the jury at Shannon's trial. Shannon told the dispatcher that his girlfriend was hurt and that he needed an ambulance at his home. Upon prompting by the dispatcher, Shannon said it was a gunshot wound and described the incident as "a fuckin' accident." When asked whether she shot herself, he said, "Fuck. No, I think that I did actually."

San Mateo County Deputy Sheriff James House was the first officer to arrive at the crime scene. Shannon led him upstairs to the living room where the victim lay. Shannon pointed out the gun, a .38-caliber revolver with a "hair trigger" modification, which was on the kitchen counter. Stack suffered a single gunshot wound to the left temple. She was nude from the waist up and had numerous bruises on her face and upper body. A sweatshirt was on the floor by her feet; inside it was a gold chain with a broken clasp. Shannon was wearing only boxer shorts and had scratches on his face and upper body.

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[1] Shannon first called his father to tell him Stack had been shot and asked him what to do. Shannon's father then told him to call "911."

The autopsy revealed human blood and tissue inside the barrel of the gun and on the outside surface of the gun, confirming the shot was fired very close to the victim's head. Stack was killed by a single gunshot which entered at the left temple, went through the brain, and exited in the area of the right temple. Gunshot residue was found both inside and outside of the wound, indicating the gun was fired within a fraction of an inch of the victim's head. Gunshot residue was also found in equal amounts on both of Stack's hands.

Laboratory testing also revealed there was semen in the victim's vaginal cavity, indicating recent sexual intercourse. Semen was also found on Shannon's boxer shorts. Additionally, both Stack and Shannon had cocaine and/or alcohol in their systems at the time of the murder.

At trial, the prosecution argued Shannon either intended to kill Stack or behaved with wanton disregard for human life by brandishing a gun he knew was particularly dangerous. The defense argued the shooting was accidental. In making this argument, however, it did not rely on a heat of passion defense.

The court instructed the jury on first and second degree murder, as well as voluntary and involuntary manslaughter. Included were instructions on heat of passion and sudden quarrel. The jury deliberated for two full days and, on December 12, 1994, returned a verdict of second degree murder. It also found Shannon guilty of personal gun use and of unlawfully possessing an assault weapon.

Shannon filed a direct appeal in the California Court of Appeal, First Appellate District. That court affirmed his conviction on June 27, 1996 in a published opinion. *See*

People v. Shannon, 46 Cal.App.4th 1365, 54 Cal.Rptr.2d 416 (1996). On October 17, 1996, the California Supreme Court denied review.

On August 28, 2000, Shannon filed a petition for a writ of *habeas corpus* in the California Court of Appeal. The First Appellate District Court denied the petition on its merits, but without opinion. The California Supreme Court denied review on January 30, 2001. Shannon subsequently filed the instant petition with this Court on August 27, 2001.

LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244, *et seq.*, (hereinafter "AEDPA"), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of *habeas corpus* filed by state prisoners. Petitions filed by prisoners challenging noncapital state convictions or sentences must be filed within one year of the latest of four dates: (1) the date on which the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (2) the date on which the impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (3) the date on which the constitutional right asserted was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (4) the date on which the factual predicate of the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A-D). Time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the

one-year limit. *See id.* at § 2244(d)(2); *Duncan v. Walker,* 533 U.S. 167, 181, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

With the enactment of the AEDPA, a federal court "shall not" grant an application for a writ of *habeas corpus* by a state prisoner unless the state court's earlier resolution of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Supreme Court clarified the guidelines in § 2254(d), holding that the determination to be made on federal *habeas* review is whether the state court's determination was objectively unreasonable, not merely incorrect. *Id.* at 365.

The Court will grant *habeas* relief only if it finds: (1) a constitutional error occurred at the state court level, and (2) such error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The petitioner bears the burden of establishing the constitutional error had a substantial and injurious effect or influence in determining the jury's verdict. *Rodriguez v. Marshall,* 125 F.3d 739, 744 (9th Cir.1997).

ANALYSIS

I. Statute Of Limitations

In its memorandum in support of its answer, Respondent argues the instant petition is untimely. Notwithstanding Shannon's assertions to the contrary, the Court agrees with Respondent and finds this petition is barred by the statute of limitations established under the AEDPA.

Shannon was convicted of second degree murder by a San Mateo jury in 1994. On direct appeal, Petitioner argued the jury instructions were erroneous in that they misstated the elements of manslaughter. The California Court of Appeal, First Appellate District, affirmed Shannon's convictions on June 27, 1996. *See People v. Shannon*, 46 Cal.App.4th 1365, 54 Cal.Rptr.2d 416 (1996). The California Supreme Court denied review on October 17, 1996.

In *Bowen v. Roe*, 188 F.3d 1157 (9th Cir.1999), the Ninth Circuit held "when a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the AEDPA's one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires." *See id.* at 1159. Shannon failed to seek a writ of certiorari from the United States Supreme Court, and thus his conviction became final on January 15, 1997, ninety days after the California Supreme Court decision denying review on October 17, 1996.

From January 15, 1997, the AEDPA's one-year statute of limitations began running and Shannon had until January 15, 1998, one year after his conviction became final, in which to file a federal *habeas* petition. Shannon, however, filed no such petition.

On August 28, 2000, Shannon filed a petition for a writ of *habeas corpus* in the California Court of Appeal. He did so based on the June 2, 2000 decision by the California Supreme Court in *People v. Lasko*, 23 Cal.4th 101, 96 Cal.Rptr.2d 441, 999 P.2d 666 (2000), which held, as a matter of state law, the crime of voluntary manslaughter did not require, and has never required, an intent to kill. Relying on the 2000 decision in *Lasko*, Shannon argued the trial court's misinstruction on voluntary manslaughter relieved the prosecution of its burden of proof on the element of malice, just as he did on direct appeal. The First District Court of Appeal denied the petition on November 9, 2000. Subsequently, on January 30, 2001, the California Supreme Court denied review. Shannon then filed the current federal *habeas* petition on August 27, 2001.[2]

A. Factual Predicate Of The Present Claim

Although Shannon concedes the facts listed above, he argues his petition is timely because the date on which his conviction became final is not the relevant date for statute of limitations purposes. Instead, Shannon asserts the relevant date for the statute to run is the date "on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," or the date on which the California Supreme Court issued the *Lasko* decision. Specifically, Shannon asserts before *Lasko*, he had no federal due process claim as Respondents had erroneously been relieved of its

[2] Under 28 U.S.C. § 2244(d)(2), the federal limitations period was tolled during the pendency of Petitioner's state writ proceedings (from August 28, 2000 to January 30, 2001).

burden of proof on the element of malice, absent a state court ruling that under California law the crime of voluntary manslaughter did not require, and has never required, an intent to kill. Thus, Shannon argues his federal claim did not ripen until the date of the *Lasko* decision.

The Court is not persuaded. Shannon fails to cite to,[3] and this Court has not found, any legal authority supporting Shannon's argument that a state court decision which validates a petitioner's assignment of state law serves as a factual predicate for a habeas claim which could not have been discovered through the exercise of due diligence. Moreover, consideration of cases interpreting the language of § 2244(d)(1)(D) require the factual predicate to be one based on the discovery of evidence that could not reasonably have been discovered previously. The cases do not allow for the application of the exception to the discovery of the basis for a legal theory.

For example, in *Flanigan v. Johnson*, 154 F.3d 196 (5th Cir.1998), the petitioner argued his trial counsel had performed ineffectively for failing to inform him that he did not have to testify at his trial. The petitioner argued his petition was not untimely because he was unaware of

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[3] The only case Shannon cites to is *LaGrand v. Stewart*, 170 F.3d 1158 (9th Cir.1999) for the proposition that the Ninth Circuit permits claims to be filed after they become ripe. While the proposition might be true, the Court finds *LaGrand* inapposite as it is not a statute of limitations or accrual case. Indeed, it does not discuss § 2244(d)(1)(D) or the "factual predicate" of the petitioner's claim, rather that case is about § 2244(b) and whether or not the petitioner should be allowed to file a second or successive ("SOS") petition for a writ of *habeas corpus*. *See LaGrand*, 170 F.3d at 1160 (permitting the petitioner to file a successive petition when the first was denied on grounds the claim was not ripe).

the "factual predicate" of his claim until November 1996, when he obtained an affidavit from his trial counsel on this issue. *See id.* at 198. The Fifth Circuit rejected this application of § 2244(d)(1)(D) because petitioner was aware of the factual predicate of his claim prior to obtaining the affidavit from his trial counsel. That court held the tolling provided for in § 2244(d)(1)(D) does not allow the statute of limitations to run once the petitioner has gathered sufficient evidence in support of a claim. *See id.* at 199.

Likewise, in *Owens v. Boyd*, 235 F.3d 356 (7th Cir.2000), the Seventh Circuit rejected petitioners argument that § 2244(d)(1)(D) applied to his claim. That court held "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance."[4]

Like the petitioner in *Flanigan and Owens*, Shannon knew the factual predicate of his claim at the time of his trial. In fact, he based his direct appeal in 1996 on the same grounds. Just as it does not provide an exception for when, or if, a petitioner can muster sufficient evidence in support of a claim, the language of § 2244(d)(1)(D) does not provide an exception for when, or if, case law becomes available to cause a petitioner to recognize the legal significance of the evidence. This is especially true since a federal constitutional error, if any, would have existed regardless of the state of the law.[5] Accordingly, the petition

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[4] *Owens* is cited favorably by the Ninth Circuit in *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir.2001).

[5] Shannon relies on *Solis v. Garcia*, 219 F.3d 922 (9th Cir.2000) for the proposition that absent a state court ruling that the challenged instructions misstated the elements of murder and manslaughter under

(Continued on following page)

does not fall under the exception established in § 2244(d)(1)(D).

B. The *Shannon* Decision Does Not Amount To A State-Created Impediment

In his Traverse, Shannon alternatively argues that his claim is timely under § 2244(d)(1)(B) because prior to *Lasko*, the state of California law constituted a state-created impediment to his filing a petition. In support, Shannon points to the opinion issued by Court of Appeal, wherein the court acknowledged the instruction given at Shannon's trial was probably erroneous, but held it was bound by California Supreme Court precedents which seemingly approved such instructions. *See People v. Shannon*, 46 Cal.App.4th 1365, 54 Cal.Rptr.2d 416 (1996). On that basis, Petitioner contends the State prevented him from seeking federal *habeas* relief in this Court, and until *Lasko* in June 2000, that impediment was not lifted.

The Court, again, is not persuaded. Shannon cites no authority to support his claim that court opinions may constitute a "state-created impediment" as established by § 2244(d)(1)(B). In fact, the limited case law interpreting this section concerns impediments created by actions of

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California law, he had no federal due process claim. In *Solis*, the Ninth Circuit stated a federal court must accept the identification of the elements of an offense as established by the California Supreme Court. *See Solis*, 219 F.3d at 927. It does not follow, however, that Shannon had no federal due process claim under, as discussed below, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), where the United States Supreme Court held "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly raised in a homicide case." *Mullaney*, 421 U.S. at 704.

prison officials. *See Whalem/Hunt v. Early,* 233 F.3d 1146 (9th Cir.2000) (finding the unavailability of AEDPA in prison law library may constitute impediment to filing timely *habeas* application within the meaning of § 2244(d)(1)(B)); *Giraldes v. Ramirez-Palmer,* No. C 98-2757 SI, 1998 U.S. Dist. LEXIS 17573 (N.D.Cal. Nov. 3, 1998) (rejecting petitioner's argument that a prison lockdown impeded his efforts to file a petition within the meaning of § 2244(d)(1)(B)); *Love v. Roe,* No. 98-0718 IEG (LAB), 1999 U.S. Dist. LEXIS 5934 (S.D.Cal. Feb. 24, 1999) (finding the prison officials' failure to deliver petitioner's materials to him while petitioner was in administrative segregation did not constitute a state-created impediment within the meaning of § 2244(d)(1)(B)).

Furthermore, even if the *Shannon* decision arguably constituted a state action in violation of the Constitution or laws of the United States, such action did not create an impediment to Shannon's filing of his application. Shannon argued on direct appeal the erroneous jury instruction relieved the prosecution of its burden of disproving heat of passion beyond a reasonable doubt. Regardless of what California courts held on his direct appeal, Shannon was always free to file a petition based on a violation of federal due [sic] under *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), where the United States Supreme Court held: "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly raised in a homicide case." *Mullaney,* 421 U.S. at 704 (finding that relieving the burden of proof from the prosecution violated the defendant's due process rights). Therefore, if Shannon is correct that the jury instructions at his trial effectively relieved the prosecution

of its burden of proving the absence of heat of passion beyond a reasonable doubt, no matter what the law of California was, Shannon always had a claim of a due process violation in federal court. On these grounds, the Court finds the petition does not fall within the exception of § 2244(d)(1)(B) and is untimely. Accordingly, the petition is DISMISSED.

II. Merits

Even assuming Shannon's application was timely, the Court turns to the issue of whether the trial court here committed error and, if yes, that error was prejudicial. Shannon argues the trial court gave an erroneous jury instruction which relieved the prosecution of its burden of proving beyond a reasonable doubt the absence of heat of passion. This error, according to Shannon, was prejudicial because it had a "substantial and injurious effect or influence in determining the jury's verdict." On that basis, Shannon contends he was denied his due process rights under the Fourteenth Amendment.

Respondent counters the instructions adequately informed the jury that heat of passion negates both express and implied malice, reducing the crime from murder to manslaughter. The instructions further placed the burden of proving the absence of heat of passion beyond a reasonable doubt on the prosecution. On that basis, Respondent contends there was no error. Even if there were, Respondent contends the error was not prejudicial.

In determining whether the instruction given constituted error, the Court considers again the decision in *Lasko* where the trial court gave erroneous instructions pertaining to voluntary manslaughter as requiring an

intent to kill. As was the case in *Lasko,* the trial court here erred in telling the jury it had to find Shannon intended to kill Stack in order to convict him of voluntary manslaughter. *See Lasko,* 23 Cal.4th at 107, 111, 96 Cal.Rptr.2d 441, 999 P.2d 666 (finding error in the instruction of intent to kill as element for voluntary manslaughter).

The Court now turns to the issue of prejudice and, again, considers the *Lasko* decision. In *Lasko,* the trial court gave CALJIC No. 8.50, a standard instruction explaining the distinction between murder and manslaughter:

> When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation *the offense is voluntary manslaughter.* In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, *the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel. . . .*

See Lasko, 23 Cal.4th at 111-12, 96 Cal.Rptr.2d 441, 999 P.2d 666 (emphasis added). By these instructions, the California Supreme Court determined the error was not prejudicial because the trial court instructed the jury it could not convict the defendant of murder unless the prosecution proved the defendant was not acting in the heat of passion at the time of the killing, regardless of whether the killing was intentional or unintentional. *See id.* at 112, 96 Cal.Rptr.2d 441, 999 P.2d 666.

Here, the court in Shannon's trial gave CALJIC No. 8.50, the same instructions given in *Lasko*. *See* CT 334.[6] With these instructions, and as found in *Lasko*, the Shannon court properly instructed the jury that it could not convict Shannon of murder unless the prosecution proved he was not acting in the heat of passion beyond a reasonable doubt.[7] In light of the instructions given, the Court finds the prosecution's burden was not eased and, the error as to the intent to kill requirement was not prejudicial.[8] On this basis, the Court would have denied the petition had it reached the merits.

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[6] "CT" refers to the Clerk's Transcript of the state court trial, submitted as Exhibit A, which is lodged with the Clerk of the Court.

[7] Additionally, at Shannon's trial the court instructed the jury that voluntary manslaughter is a lesser crime to murder in the second degree, and emphasized: "if you have reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder." *See* CT 341 (emphasis added). The Court finds this instruction further emphasizes the proper burden of proof.

[8] Shannon further relies on statements made by the prosecutor as evidence of prejudice, although he does not argue prosecutorial misconduct. While the arguments of counsel are relevant in considering whether it is reasonably likely the jury would have applied the erroneous instruction, the actual instructions, viewed as a whole, carry substantially more weight. *See Boyde v. California*, 494 U.S. 370, 384-85, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Shannon points out the prosecutor told the jurors that if they "don't find there was an intent to kill, then what you have is second degree murder." Memorandum In Support of Petition for Writ of *Habeas Corpus*, 14:25-26. However, Shannon also points out the prosecutor informed the jury it was not permitted to even consider the crime of voluntary manslaughter unless and until it found "the defendant not guilty of the greater crimes. Both first and second degree murder." *See id.* at 15:1-3. After considering the instructions taken as a whole, the Court finds the jury could not have reached the elements of voluntary manslaughter, including the presumably erroneous instruction requiring "intent to kill" as an

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CONCLUSION

Based on the foregoing reasons the petition for a writ of *habeas corpus* is DISMISSED as untimely.

IT IS SO ORDERED.

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element, without first finding an absence of heat of passion beyond a reasonable doubt.

54 Cal.Rptr.2d 416

Court of Appeal, First District, Division 5, California.

The PEOPLE, Plaintiff and Respondent,

v.

Brian Dennis SHANNON, Defendant and Appellant.

No. A069386.

June 27, 1996.

Certified for Partial Publication*

Daniel E. Lungren, Attorney General of the State of California, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Senior Assistant Attorney General, Catherine A. Rivlin, Supervising Deputy Attorney General, Jeremy Friedlander, Deputy Attorney General, for plaintiff and respondent.

Riordan & Rosenthal, Dennis P. Riordan, San Francisco, Dylan L. Schaffer, Stanford, for defendant and appellant.

KING, Associate Justice.

Appellant Brian Dennis Shannon was convicted by jury of second degree murder by use of a firearm (Pen.Code, §§ 187, subd. (a); 12022.5, former subd. (a)).[1] He seeks reversal based upon alleged error in the standard form instruction for voluntary manslaughter, CALJIC No. 8.40. He also claims the jury's verdict was the product of undue influence because of juror misconduct

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* Pursuant to rules 976 and 976.1, California Rules of Court, this opinion is certified for publication, with the exception of parts III and IV.

[1] Unless otherwise noted, all statutory references are to the Penal Code.

and ribbons worn by spectators in the courtroom. We affirm.

I. Facts

On the morning of October 17, 1993, at 8:06 a.m., appellant made a 911 call from his residence at 701 Palma in El Granada. A tape of the call was played for the jury. Appellant requested an ambulance. Upon prompting by the dispatcher, appellant stated that his girlfriend had been shot. When asked if she had shot herself, appellant replied, "No, I think I shot her actually . . . the whole damn thing was an accident . . . she was just sitting there and I . . . she is gurgling and it's driving me crazy!"

When emergency personnel arrived, they found the victim, 24-year-old Kimberly Stack, appellant's girlfriend, laying on the living room floor. She suffered a single gunshot wound to the left temple. She was nude from the waist up and had numerous bruises on her face and upper body. Appellant was shirtless and had fresh scratches on his face and upper body. A .38 caliber revolver, along with numerous other firearms, were located in the residence. Appellant identified a .38 caliber revolver, which had been modified to have a "hair trigger," as the murder weapon.

Subsequent laboratory testing revealed human tissue inside the barrel of the murder weapon, confirming that the victim's death was the product of a close contact gunshot wound to the left temple. It was determined that the fatal shot was fired, at most, only a fraction of an inch from the victim's head. There was semen in the victim's vaginal cavity, indicating recent sexual intercourse. Both appellant and the victim had cocaine and/or alcohol in their systems at the time of the murder. Several neighbors

testified they heard loud arguing coming from the direction of appellant's residence on the night of the shooting.

The prosecution argued that appellant either intended to kill the victim or behaved with wanton disregard for human life by brandishing a gun that he knew was particularly dangerous. The defense argued the shooting was accidental.

The trial court instructed the jury on first and second degree murder and voluntary and involuntary manslaughter. The jury was also instructed on excusable accident, heat of passion, sudden quarrel and voluntary intoxication.

The jury returned its verdict of second degree murder, finding true the personal use allegation. Appellant was sentenced to 15 years to life for the murder with a consecutive four-year term for the gun use. In addition, appellant received a 16-month consecutive term for unlawfully possessing an assault weapon (§ 12280, subd. (b)), a charge to which he pled nolo contendere at the commencement of trial.

II. Instructional Error

Appellant contends the trial court erred in failing to modify, *sua sponte*, the standard form instruction defining the intent required for voluntary manslaughter. Murder and manslaughter were distinguished for the jury in that murder requires malice while manslaughter does not. (CALJIC No. 8.50.) The court instructed the jury that manslaughter is of two types, voluntary and involuntary. (CALJIC No. 8.37.) The challenged instruction on voluntary manslaughter, as given to the jury, read as follows:

"The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought *when there is an intent to kill.* There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion. In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved: One, that a human being was killed; two, that the killing was unlawful; and three, that the killing was done *with the intent to kill.* (CALJIC No. 8.40; emphasis added.)"

Involuntary manslaughter was defined as the unlawful killing of a human being "without malice aforethought and without an intent to kill." (CALJIC No. 8.45.) The jury was also instructed that appellant could be found guilty of second degree murder if he had no intent to kill but nonetheless, acted deliberately with a conscious disregard for human life. (CALJIC No. 8.31).

The crux of appellant's argument is that because CALJIC No. 8.40 included the specific intent to kill as a necessary element of voluntary manslaughter, the instruction precluded the jury from considering whether appellant had acted upon a sudden quarrel or in the heat of passion while committing the act resulting in the victim's death if the jury believed only that appellant had acted in conscious disregard for life but not with the specific intent to kill. The net effect of the quoted instructions, appellant argues, is that the jury was precluded from considering the mitigating effects of provocation unless they found appellant acted with the express intent to kill. To wit, if the jury found appellant had not formed the express intent to kill but acted only in conscious disregard for human life, which establishes nothing more than implied malice, the mitigating effects of any provocation would be irrelevant,

and the jury would be forced to find appellant guilty of second degree murder. Appellant contends that this is neither legally nor logically sound since the more blameworthy state of mind, i.e., express intent to kill, would result in a lesser punishment than that necessarily imposed for acts committed without an express intent and, consequently, a less culpable mental state. Appellant points out that this case raises a novel "issue regarding the adequacy of an instruction used in hundreds of cases throughout California courts."

The People emphasize that CALJIC No. 8.40, the standard voluntary manslaughter instruction, is patterned after language from long-standing California Supreme Court precedent. (*People v. Hawkins* (1995) 10 Cal.4th 920, 958-959, 42 Cal.Rptr.2d 636, 897 P.2d 574; see also *People v. Brubaker* (1959) 53 Cal.2d 37, 44, 346 P.2d 8; *People v. Ray* (1975) 14 Cal.3d 20, 28, 120 Cal.Rptr. 377, 533 P.2d 1017; *People v. Forbs* (1965) 62 Cal.2d 847, 852, 44 Cal.Rptr. 753, 402 P.2d 825.) Significantly, our Supreme Court has defined voluntary manslaughter as a specific intent crime requiring an intent to kill (*People v. Gorshen* (1959) 51 Cal.2d 716, 732-733, 336 P.2d 492, disapproved on another point in *People v. Wetmore* (1978) 22 Cal.3d 318, 324, fn. 5, 149 Cal.Rptr. 265, 583 P.2d 1308). Despite appellant's invitation, we are not in a position to independently interpret the penal statute defining voluntary manslaughter (§ 192) to arrive at a different conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; see *People v. Eastman* (1993) 13 Cal.App.4th 668, 674-675, 16 Cal.Rptr.2d 608.)

Courts which have modified the standard formulation of the intent required for voluntary manslaughter have

done so at their peril. For instance, in *People v. Fusselman* (1975) 46 Cal.App.3d 289, 120 Cal.Rptr. 282, the court found the instruction on the relationship of the diminished capacity defense to the specific intent required for voluntary manslaughter to be erroneous on its face where the court defined the necessary intent as the intent "to commit murder." The court explained: "[T]he intent which is required for first degree murder, as well as voluntary manslaughter, is to kill; we know of no judicially recognized mental state of an intent 'to murder.'" (*Id.* at p. 304, 120 Cal.Rptr. 282.)

In *People v. Germany* (1974) 42 Cal.App.3d 414, 116 Cal.Rptr. 841, the court found the instructions given on the intent required for voluntary manslaughter to be erroneous where the court struck all references to "specific intent" and substituted "criminal intent." The court agreed with appellant that these instructions could have potentially misled the jury into believing that the crime of voluntary manslaughter required only a general intent. This was error because "[v]oluntary manslaughter is a specific intent crime" requiring an intent to kill. (*Id.* at p. 418, 116 Cal.Rptr. 841, citing *People v. Gorshen, supra,* 51 Cal.2d at pp. 732-733, 336 P.2d 492.)

With the weight of this authority as a backdrop, appellant contends the trial court should have modified, *sua sponte,* CALJIC No. 8.40 to instruct the jury that an *unintentional* killing, committed in conscious disregard for its consequences, can be reduced to voluntary manslaughter by the existence of heat of passion or sudden quarrel. We cannot agree. We find nothing which could support an argument that CALJIC No. 8.40 misstates the law on voluntary manslaughter as decided by our Supreme Court.

The crux of appellant's argument is that if the jury found an unintentional killing committed with adequate provocation to negate malice, the court's instructions gave the jury no choice but to convict appellant of second degree murder.[2] Appellant's argument does make sense. How can a conviction of second degree murder not require an intent to kill while voluntary manslaughter, a less serious crime, requires an intent to kill? Nowhere in section 192, which defines voluntary manslaughter, is an intent to kill mentioned. This element, missing from the statutory definition, is stated in decisional law, often without analysis. As an inferior court we are bound by the Supreme Court's decision that an intent to kill is an element of voluntary manslaughter. We are limited to recommending to the Supreme Court that this case justifies a reexamination of their previous decisions on this issue.

III.-IV**

The judgment is affirmed.

PETERSON, P.J., and HANING, J., concur.

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[2] The only evidence to support this argument is inadmissible. Three weeks after the jury reached its verdict one member of the jury, writing to the trial judge expressing appreciation for having served on the jury, wrote: "I think your jury would have gone with involuntary manslaughter, if it had not been the wording of your instructions (malice of forthought [sic] and intent) and as 1 of the 12 jurors we did vote at 100% there was no intent. We were very confused and felt because of those words we could not go with manslaughter, so we went reluctantly with the 2nd degree as your instructions said we had to follow them even if we didn't like them."

** See footnote *, *ante*.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION FIVE

In re BRIAN SHANNON on Habeas Corpus

Court of Appeal No. A092308
San Mateo Co. Super. Ct. No. CR33640

(Filed Nov. 9, 2000)

BY THE COURT:

The court has reviewed the petition, the opposition and reply briefs, and the record from petitioner's appeal (case number A069386). The petition for writ of habeas corpus is denied, for failure to state a prima facie case for relief.

Date NOV 09 2000 JONES, P.J. P.J.

Court of Appeal, First Appellate District,
Division Five – No. A092308
S093044

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jan. 30, 2001)

In re BRIAN DENNIS SHANNON on Habeas Corpus

Petition for review DENIED.

George [stamp]
Chief Justice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN DENNIS SHANNON, Petitioner-Appellant, v. ANTHONY NEWLAND, Warden, Respondent-Appellee.	No. 03-16833 D.C. No. CV-01-03275-MJJ Northern District of California, San Francisco ORDER (Filed Aug. 23, 2005)

Before: BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.